



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

PROPOSED DECISION

Peterson's Playmates

ML-09-0334

On October 9, 2009, the petitioner filed a hearing request pursuant to Wis. Stat. § 227.44. The petitioner contests the authorization/payment refusal action reflected in a notice issued by the Wisconsin Department of Children and Families (Department) on September 23, 2009. Following a prehearing conference on November 5, 2009, a hearing was conducted on February 11, 2010, at Milwaukee, Wisconsin. The record was held open for the submission of additional information and a stipulation by the parties, and a final post-hearing conference was conducted on June 11, 2010 to clarify the terms of the stipulation.

The issues for determination are whether the Department correctly refused to pay Wisconsin Shares program payments to the provider effective September 19, 2009 based on reasonable suspicion of program violations and whether the Department correctly determined that the provider was overpaid in the amount of \$4240.93.

There appeared, at that time and place, the following persons:

PARTIES IN INTEREST:

Petitioner:

Peterson's Playmates, by

Attorney Mark A. Sweet
Sweet and Associates, LLC
2510 East Capitol Drive
Milwaukee, WI 53211

Respondent:

Department of Children and Families, by

Attorney Eric Volkmann
Department of Children and Families
201 East Washington Avenue, 2nd Floor
Madison, Wisconsin, 53703

Administrative Law Judge:
Patrick T. Currie
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner is licensed as a child care provider, located in Milwaukee, Wisconsin, with the license having been in effect since October 2, 2008. The facility is authorized to provide care daily, from 6:00 am to 12:00 am, with a maximum capacity of eight children.
2. On September 23, 2009, the Department of Children and Families (Department) issued a letter to the petitioner. That letter declared that the Department was refusing to make child care payments from September 19, 2009, forward, "based on a reasonable suspicion that you have violated provisions of the Wisconsin Shares program." The violated provisions are not identified, and no factual allegations are made in the letter. The authorizing statute for the action was Wis. Stat. § 49.155(7)(a)4. See Exhibit R-3. The petitioner then appealed to this Division.
3. On March 16, 2009, Department licensing specialist Linda Schiellack visited the facility and observed nine children in care.
4. On April 22, 2009, the Department issued a "Warning Letter of Non-Compliance" to the facility citing the above violation and another involving a failure to maintain an appropriate file for each staff member. The letter warned Deshawn Peterson, the licensee, of further sanctions should any additional violations be discovered.
5. In 2009, the Department initiated an investigation into possible fraud or other abuses in the Wisconsin Shares program and devised a system to scan providers and their records for what are called "red flags" of possible program violations.
6. In the instant case, there were "red flags" to which the Department's attention was directed. The provider was being reimbursed at an annual rate of approximately \$19,000 per child. The expected annual rate, based on some type of examination of all providers' histories, would be \$9,000 to \$10,000 per child.
7. Because children come and go, arriving and departing at different times during a typical day, the actual number of children versus the authorized "slots" can be in excess of one child per slot. The expected number is approximately 1.5 children/slot. In this case, the provider had 2.88 children/slot.
8. Having been alerted to the possibility of program violations, the Department conducted an investigation that included an onsite visit to the provider during what would be considered normal operating hours. The investigator found only three children present, and determined that there were missing attendance records, for the weeks July 5 to July 11, 2009, and August 30 to September 6, 2009.

9. The Department examined the provider's "Child Care Attendance Reports" (See Exhibit R-7) and determined that the provider had been overpaid in the amount of \$4240.93. The documentary evidence supporting that overpayment determination is Exhibit R-8. The overpayment amount is attributed entirely to the payments made for the weeks of August 23 to August 30, 2009, and August 30 to September 6, 2009.
10. The provider, having initially been unable to provide attendance records for the week of August 30 to September 6, 2009, did provide the "Daily Attendance Record" for that week after the Department had calculated the overpayment set forth in Exhibit R-8, but before the hearing in this matter.

DISCUSSION

The petitioner is a child care provider. Some or all of the parents of the children in the provider's care are eligible for the Wisconsin Shares child care subsidy due to low income. The Department issued a notice to the petitioner declaring that the Department was refusing to make child care payments to the petitioner.

The Department initiated its action by relying upon the following statutory provision in effect on the day in question:

(7) REFUSAL TO PAY CHILD CARE PROVIDERS. (a) The department or the county department ... may refuse to pay a child care provider for child care provided under this section if any of the following applies to the child care provider, employee or person living on the premises where child care is provided:

1. The person has been convicted of a felony or misdemeanor that the department or county department determines substantially relates to the care of children.
2. The person is the subject of a pending criminal charge that the department or county department determines substantially relates to the care of children.
3. The person has been determined under s. 48.981 to have abused or neglected a child.
4. *The department or county department reasonably suspects that the person has violated any provision under the program under this section or any rule promulgated under this section.*

(emphasis added)

Wis. Stat. § 49.155(7)(a)4

No code language was promulgated to provide direction in the implementation of Wis. Stat. § 49.155(7)(a)4.

Wisconsin Admin. Code § DCF 250.04(6)(a) provides that the provider shall maintain a current written record on each child enrolled, and shall make the record available to the licensing representative upon request. Wisconsin Admin. Code § DCF 250.04(6)(b) provides that the licensee “shall maintain a current, accurate written record of the daily attendance on a form prescribed by the department that includes the actual time of arrival and departure for each child for the length of time the child is enrolled in the program.”

The Department has continually informed providers of the need to keep attendance reports current and accurate. See Exhibit R-6, a series of Department “Sharing the News” newsletter sent to Shares program providers. The newsletters reiterated the need to keep accurate, up-to-date attendance records and that the providers were required to make them available to licensing agents upon request.

Per statute, a provider must maintain records that show each child’s arrival and departure times:

(6m) Child care provider recordkeeping. With respect to attendance records, a child care provider shall do all of the following:

- (a) Maintain a written record of the daily hours of attendance of each child for whom the provider is providing care under this section, including the actual arrival and departure times for each child.

Wisconsin Stat. § 49.155(6m(a)). This petitioner violated this requirement. Thus there was reasonable suspicion that the provider violated a provision of Wis. Stat. §49.155, and thus the Department was authorized to refuse to make Wisconsin Shares payments to the provider effective September 19, 2009.

With regard to the submission of “Child Care Attendance Reports” that appear to establish a pattern of payment requests that overstate the amount actually owed to the provider, it appears that the position of the provider, judging from questions asked of witnesses by counsel for the provider, is that he was mistaken, on a systematic basis, in requesting Shares payments due to his misunderstanding of the correct way to fill out and submit the forms. The provider did not testify at the hearing.

Wisconsin Admin. Code § DCF 201.04(5)(b) requires a child care administrative agency to take all reasonable steps necessary to recover from a provider any overpayments made for child care services for which the provider is responsible.

In this case, the Department was able to establish that an overpayment had been made. The provision of what appear to be “Daily Attendance Records” covering some portion of the dates in issue for which an overpayment is claimed to have been made does not establish that there was no overpayment. One can see that to allow a submission of such records a period of some weeks or even months after the fact presents a situation rife with the possibility of fraud.

The Department correctly determined that the overpayment to the petitioner was in the amount of \$4240.93.

There is no basis for reversing or changing the Department's actions regarding refusal to pay Wisconsin Shares payments based on reasonable suspicion of program rule violations or regarding the overpayment.

CONCLUSIONS OF LAW

1. The Department had a reasonable suspicion that petitioner was violating child care rules and thus correctly suspended Wisconsin Shares payments.
2. The Department correctly determined that the provider was overpaid in the amount of \$4240.93.

NOW, THEREFORE, it is ORDERED

That the petition is dismissed.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Children and Families for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of
Madison, Wisconsin, this _____
day of _____, 2010.

Patrick T. Currie
Administrative Law Judge
Division of Hearings and Appeals